IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER 70/2007.

SHRI. AJIT VASUDEV NIGALYE
AND ANR. ..... Appellants.

Versus

SHRI ATCHUT VASUDEV
NIGALYE AND 8 OTHERS. ..... Respondents.

With

APPEAL FROM ORDER 49/2007.

SHRI. AJIT VASUDEV NIGALYE
AND ANR. ..... Appellants.

Versus

SHRI ATCHUT VASUDEV
NIGALYE AND 8 OTHERS. ..... Respondents.

Mr. Sudin M. S. Usgaonkar,Advocate for the appellants.
Mr. Deepak Gaonkar, Advocate for the respondent Nos. 1 & 2.
Mr. A. Kansar, Advocate for the respondent Nos.4 & 5.

Coram :- **F. I. REBELLO.**

Date : - 20th November, 2007.

ORAL ORDER :

The appellants in the case were plaintiff before the trial court. The respondent Nos. 4 & 5 were the defendants before the trial Court. The suit by the appellant was for declaring the judgment and

decree dated 23.4.1975 passed in R.C.S.52/1974 in auctioning the property in favour of defendant No.9 as null and void. There are other reliefs including permanent injunction to restrain the defendant Nos. 4 & 5 the other defendants. The plaintiffs in that said suit also moved by way of miscellaneous application bearing No.132/2005. The defendant Nos. 4 & 5 filed counterclaim. In the counterclaim the defendant Nos. 4 & 5 prayed for declaration that they are exclusive owner of suit property No.211/9 and 212/10 of village Mayem and also sought mandatory injunction. Another C.M.A. is also filed which was bearing No.142/2005. Both application were disposed of by different orders on 30.3.2007. The application for temporary injunction prayed for by the appellant herein, was dismissed. The application for temporary injunction prayed for by respondent Nos. 4 & 5 herein, was allowed. Against these orders the appellant has preferred two appeals bearing No.49/2007 and A.O.70/2007 along with civil miscellaneous applications.

I have heard the counsel for the parties. On perusal of the impugned orders it appears that the learned trial judge has not recorded the finding as who was in possession of the suit property. The injunction of the nature prayed for could only have been granted if the Court arrived at the conclusion that the plaintiff and / or defendants were in possession. The contention of the plaintiff was that survey documents are in their favour. The contention of the defendant Nos. 4 & 5 was that their predecessor-in-title had purchased the property in a Court auction. The property which was attached was a specific part of the property and that was sold and put in possession of the auction purchaser. The plaintiffs, it is submitted, have not explained as to how they came in possession of the suit property, subsequent to the said attachment and sale pursuant to Court auction. None of these aspects seems to have

been addressed by the trial court.

The learned trial Court has also taken into consideration which he could take, that the application made by the father of the plaintiff i.e. appellants, herein claiming tenancy in respect of subject matter. Apart from considering prima facie case, balance of convenience and irreparable loss or injury, there ought to have been a finding based on possession.

Considering the above, both the impugned orders are set aside. The matter is remanded back to the learned trial Court for hearing the parties afresh and passing fresh orders according to law. Both the applications be disposed of within a period of 30 days from a copy of the order being produced by the parties before this Court.

F. I. REBELLO.

SMA